

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL FROM ORDER NO.403 OF 2005

Ismail Ibrahim Shelia	.. Appellant.
V/s.	
The Municipal Corporation for Greater Bombay	.. Respondent.

Mr.R.S. Ghadge for the appellant.

Ms.Geeta Joglekar for the respondent.

CORAM : A.S. OKA, J.

DATED : 5TH APRIL, 2005.

P.C. :

1. Admit. The Respondent waives service. Taken up for hearing forthwith.

2. The Appeal from Order takes exception to the judgment and order dated October 4, 2004 passed by the learned Trial Judge in Notice of Motion No.3687 of 2004.

3. The Appellant is the Original Plaintiff. The Suit filed by the Appellant-Plaintiff is for declaration that the notice issued under Section 351 of the Mumbai Municipal Corporation Act, 1888 and the order dated October 6, 2003 passed on the said Notice of Motion are illegal and bad in law. It is an admitted position that the Notice of Motion No.4139 of 2003 was filed by the Appellant-Plaintiff in the

said suit. It is also not in dispute that there is an ad-interim order passed on the said Notice of Motion by which the suit structure has been protected from demolition and the said Notice of Motion is pending.

4. The present Notice of Motion was taken out by the Appellant-Plaintiff seeking permission to carry out the repairs to the said suit structure. The learned Trial Judge has rejected the Notice of Motion by holding that unless and until fate of the suit structure is decided by the Court, permission to carry out repairs to the suit structure cannot be granted. The learned Trial Judge also noted that by granting permission to carry out repairs, the present state of suit structure will be changed.

5. I have heard the counsel appearing for the parties on merits of the appeal. The Notice of motion taken out for injunction is still pending and the structure is protected by the ad-interim order passed on the said Notice of Motion. If the said Notice of Motion is decided in favour of the Appellant - Plaintiff, considering the fact that the suit will remain pending for long time the prayer made in the present Notice of motion seeking permission to carry out repairs will have to be

considered.

6. No fault can be found with the learned Trial Judge if he declined to grant any relief in the present Notice of Motion at this stage when the main Notice of Motion for temporary injunction is not yet decided. If the main Notice of Motion for temporary injunction is dismissed, there will not be any occasion to pass order in favour of the Appellant permitting him to carry out repairs.

7. The learned Trial Judge should have kept the present Notice of Motion pending and should have heard the same either along with the Notice of Motion No.4139 of 2003 or immediately after the decision in the said Notice of Motion. Thus, the Appellant-Plaintiff is not entitled to any relief at this stage. The order dismissing the Notice of Motion will have to be quashed and set aside and the Notice of Motion will have to be restored. The said Notice of Motion will have to be decided on merits after the earlier Notice of Motion for temporary injunction is disposed of.

8. Hence, I pass the following order :

1. Impugned judgment and order dated

October 4, 2004 is quashed and set aside and the Notice of Motion No.3687 of 2004 is restored to file.

2. There will be no ad-interim relief in the said Notice of Motion No.3687 of 2004.

3. The learned Trial Judge will decide the said Notice of Motion after disposal of Notice of Motion no.4139 of 2003 taken out by the Appellant for temporary injunction. Hearing of Notice of Motion No.4139 of 2003 is expedited.

4. The Appeal from Order is partly allowed in above terms, with no order as to costs.

5. Parties and the Trial Court will act on authenticated copy of this order.

(A.S. OKA, J.)